

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-218448.2 **DATE:** June 5, 1985
MATTER OF: Beaver Linoleum & Tile Co., Inc.

DIGEST:

1. An unsuccessful bidder is not entitled to the costs of pursuing its protest, including attorneys fees, where the protest was filed prior to the effective date of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, even though GAO decided the protest in its favor.
2. GAO will not question a nonresponsibility determination unless protester demonstrates bad faith by the contracting agency or lack of any reasonable basis for the determination.
3. Award of bid preparation costs is only justified if protester shows both that the government's conduct toward the protester was arbitrary and capricious and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. Where the protester fails to show it had a substantial chance for award, GAO will deny a claim for bid preparation costs.

Beaver Linoleum & Tile Co., Inc. (Beaver), has submitted a claim for bid preparation costs and the costs of pursuing its protest, including attorneys fees, following its protest which we sustained in Beaver Linoleum & Tile Co., Inc., B-215705, Dec. 3, 1984, 84-2 C.P.D. ¶ 604. The protest arose under invitation for bids (IFB) No. GS-03-84-3-0046, issued by the General Services Administration (GSA), for the installation of carpet tile at a federal building in Philadelphia.

We deny the claim for bid preparation costs and for the costs of pursuing the protest, including attorneys fees.

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In our prior decision, we found that GSA had erroneously rejected Beaver's bid as nonresponsive because it did not believe Beaver would comply with a specification requiring carpet tile to be of "fusion bonded construction"--a matter of bidder responsibility, not responsiveness. Because Beaver was a small business, it could not be precluded from award on the basis of a nonresponsibility determination without referral of the matter to the Small Business Administration (SBA) for final disposition under certificate of competency procedures. We held that GSA's rejection of Beaver's bid without referral to SBA was unreasonable. In sustaining the protest, we concluded that termination of the substantially completed contract would not be in the government's best interest.

Concerning Beaver's request for the costs of pursuing its protest, including attorneys fees, section 2741 of the Competition in Contracting Act of 1984 (Act), Pub. L. No. 98-369, 98 Stat. 1175, 1199 (1984), and our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1985), do provide authority for our Office to grant such a remedy. However, Beaver's protest was filed on July 3, 1984, and the Act is only effective with respect to protests filed after January 14, 1985. Pub. L. 98-369, supra, § 2751(b). Prior to the effective date of the Act, we lacked the authority to award such costs. I.E. Levick and Associates, B-218294.2, Apr. 12, 1985, 85-1 C.P.D. ¶ 424.

The award of bid preparation costs is only justified where the protester shows both that the government's conduct towards the protester was arbitrary and capricious and that, if the government had acted properly, the protester would have had a substantial chance of receiving the award. City Auto Parts and Supplies, B-216291, Feb. 25, 1985, 85-1 C.P.D. ¶ 230. To have had a substantial chance of receiving award, Beaver must have been a responsible contractor. GSA, in effect, found Beaver was not a responsible contractor. Since SBA did not review Beaver's responsibility and only entitlement to bid preparation costs is at issue, we will review what, in effect, was GSA's negative responsibility determination. See Environmental Growth Chambers, B-201333, Oct. 8, 1981, 81-2 C.P.D. ¶ 286.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who, in making the determination, is vested with a wide degree of discretion and business judgment. See S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 C.P.D. ¶ 437. We therefore defer to such discretion and judgment unless the protester, who bears the burden of proving his case, shows

that there was bad faith by the procuring agency or a lack of a reasonable basis for the determination. See Venusa, Ltd., B-217431; B-217432, Apr. 22, 1985, 85-1 C.P.D. ¶ 458.

Beaver has not made the necessary showing here. There has been no allegation of bad faith on the part of procuring officials and, in our view, the record reflects a reasonable basis for a determination of nonresponsibility. GSA met with Beaver and a representative of the manufacturer of Beaver's proposed carpet tile to discuss whether Beaver was going to provide carpet tile of "fusion bonded construction" as required by the specification. GSA also consulted with industry representatives who noted the difference in manufacturing processes used by the manufacturer of Beaver's tile versus other manufacturers of "fusion bonded" tile. Based on its technical review, GSA determined Beaver intended to perform the contract inconsistent with the specifications. GSA could have used this information to support a conclusion that Beaver was nonresponsible. Therefore, Beaver has failed to demonstrate that if the government had acted properly, Beaver would have had a substantial chance of receiving the award.

The claim is denied.

for 
Comptroller General
of the United States